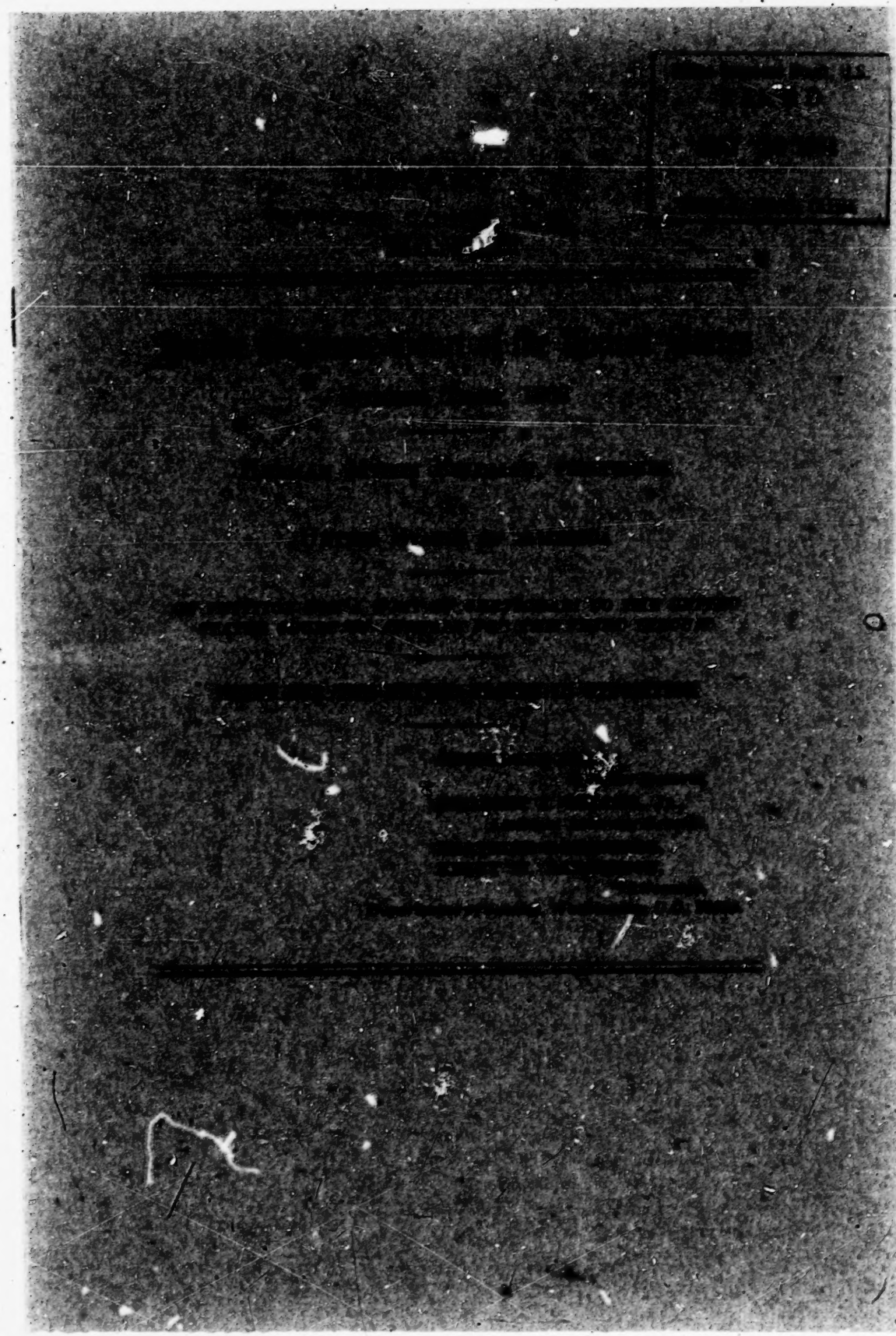

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731-851—64

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1022

HERMAN MYRON FELDMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31–42) is reported at 329 F. 2d 372. The opinion of the district court (Pet. App. 16–30) is reported at 215 F. Supp. 390.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1964. The petition for a writ of certiorari was filed on April 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether there was sufficient evidence for the jury to find, as the indictment charged, that a single conspiracy existed to deal in counterfeit currency.

2. Whether the evidence sufficiently established petitioner's participation in the conspiracy.

3. Whether the trial court abused its discretion in declining to examine the grand jury testimony of a government witness for possibly impeaching material.

4. Whether petitioner's conviction should be reversed:

(a) Because of a question to a government witness on redirect examination which the jury was instructed to disregard.

(b) Because there was on the counsel table counterfeit currency which was not introduced in evidence, where the court complied with petitioner's request to instruct the jury to disregard it.

## STATEMENT

Petitioner and seven co-defendants were indicted in the United States District Court for the Eastern District of Pennsylvania for conspiracy to deal in and utter counterfeit $20 federal reserve notes and, as to some co-defendants, for substantive offenses, in violation of 18 U.S.C. 371, 472, 473 (R. 2a–5a). Prior to trial, three co-defendants pleaded guilty (Tr. 2–5). The jury acquitted one defendant and convicted the remaining four, including petitioner (Tr. 782–784). Petitioner was sentenced to imprisonment for a period of fifteen months (R. 6a). The district court denied petitioner's motion for a judgment of acquittal or a new trial (*United States* v. *Boyance*, 215 F. Supp. 390 (E.D. Pa.); Pet. App. 16–30), and the court of appeals affirmed the conviction (Pet. App. 31–42).

The evidence may be summarized as follows:

During the month of April 1961, Boyance and Keifaber possessed counterfeit bills (Tr. 17–24, 30–31, 37–51, 84–88). Secret Service Agent Motto, under an assumed name, sought to buy counterfeit currency from Boyance, who gave him a price of $23 for $100 in counterfeit (Tr. 94–96). After various negotiations, Boyance introduced Motto to Keifaber (Tr. 102–104) who said that he had access to $244,000 in counterfeit $20 bills (Tr. 105–107). Negotiations for the purchase of counterfeit currency through defendant Bescoe collapsed because Motto refused to pay for the counterfeit in advance of its delivery (Tr. 110–114, 130–134).

Bescoe, who testified for the government, was later contacted by agent Wood, acting in an undercover capacity. Bescoe introduced Wood to Keifaber, who arranged for all of them to go to Newark, where they were to meet a party referred to as "Muzzy"[1] (Tr. 143). After they had arrived in Newark, Keifaber made a telephone call and then reported that Muzzy would not make a deal, blaming this on Ellis (Tr. 185–188). Thereafter, Wood arranged to meet Ellis, who promised to get him the counterfeit money (Tr. 190–197). Later Wood and Ellis talked with Gold concerning the purchase of bills (Tr. 202–207).

The occasion when Wood finally made contact with petitioner followed a telephone call by Ellis to "Moot-

[1] The nickname of this person is also spelled in the transcript as "Muzzi," "Mootsie," and "Mutsie."

sie" (Tr. 209). They then went to an apartment in East Orange where Ellis rang a doorbell which had next to it the name of "H. Myron Feldman." Petitioner admitted them to the apartment and was greeted by Ellis as "Mootsie" (Tr. 209–211). Petitioner asked Wood whether he was there for the twenties. He then asked how he could know that Wood was to be trusted. After frisking Wood, petitioner discussed the details of the transfer. He said that he had about $85,000 worth left, which he would sell but that he would have to receive payment in advance. Wood said that he would have to contact the man for whom he was acting (Tr. 212–216). Acting the part of the principal, another agent flew in and prepared to go through with the purchase. However, it was not completed, as Ellis reported to them, "'Mootsie' won't deal now. * * * The deal smells" (Tr. 217–223).

There was corroborative evidence in the form of surveillance by other agents (Tr. 423–427, 464–491), hotel records (Tr. 428–437, 445–446), and records of telephone calls (Tr. 441–442, 446–452, 453–463, 495–499).

The Court instructed the jury (Tr. 770–771):

> If you find from the evidence that has been submitted to you that there was a conspiracy, a common plan and undertaking, the purpose of which was to defraud the United States by intending to pass, utter and publish counterfeit $20 Federal Reserve notes and by intending to deal in counterfeit $20 bills by buying, selling, exchanging, transferring or delivering such counterfeit bills, with the intent that they be passed and used as true and genuine, then any of the defendants as to whom you are satisfied

beyond a reasonable doubt took part in that scheme and conspiracy you may convict as members of that conspiracy.

If, of course, you are not satisfied beyond a reasonable doubt that there was a conspiracy at all, then all of the defendants are entitled to be acquitted on Count 1.

If you find that one or more of the defendants committed certain acts, but were not members of the conspiracy charged, but were, in fact, members of a separate conspiracy not charged, then you should return a verdict of not guilty as to that defendant or those defendants whom you find not to be members of the conspiracy which has been charged in the indictment.

Petitioner did not except to the instructions (Tr. 775).

## ARGUMENT

1. Petitioner argues (Pet. 13) that a fatal variance existed between the allegation in the indictment of a single conspiracy and the evidence which would support an inference of two conspiracies. Petitioner's argument, more specifically, is that Boyance and Keifaber first endeavored to contact petitioner through Ellis, who later eliminated them in the negotiations by bringing the undercover agent into direct conversation with petitioner. The trial court instructed the jury that it was required, in order to convict, to find that a single conspiracy existed. The government submits that the jury was amply justified in finding that there was a single conspiracy to deal in and utter counterfeit currency.

The evidence shows that petitioner was at the center of activities involving various participants. The defendants were all seeking to dispose of counterfeit bills possessed by him. The fact that Boyance, Keifaber, and Ellis were unsuccessful in arranging a deal with petitioner and that Boyance and Keifaber did not participate in the later negotiations between Ellis and petitioner does not demonstrate that two conspiracies existed. The jury could reasonably find that the existence of petitioner at the center of both negotiations, as well as Ellis' participation in both, showed a common design and object to dispose of the bills and therefore constituted a single overall conspiracy. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556–559.

Petitioner states (Pet. 7) that defendant Gold and petitioner were in no way connected and consequently that they were not part of a single conspiracy. Agent Wood testified that the discussions between himself, Ellis, and Gold concerning the purchase of counterfeit bills did not involve petitioner, Boyance, Bescoe, or Keifaber (Tr. 358–359). This testimony, however, appears to mean that petitioner and the others were not mentioned or otherwise directly involved. The jury could nonetheless have reasonably concluded that the overall conspiracy included joint efforts by various members to dispose of bills other than these possessed by petitioner.

In any event, this contention concerns only Gold who did not appeal his conviction. Even if the transactions with Gold constituted a separate conspiracy, petitioner was not prejudiced by the introduction of evidence concerning it when the testimony included

an explicit statement that he was not involved. For, as this Court held in *Berger* v. *United States*, 295 U.S. 78, a conspiracy conviction should not be reversed just because evidence is introduced of a conspiracy involving others.

2. Petitioner contends (Pet. 12–13) that his conviction was invalid because (a) there is insufficient evidence in entirety to show that he was part of the alleged conspiracy and (b) there was insufficient independent evidence of his participation so that the trial court erred in admitting statements against him made by alleged co-conspirators outside his presence. As to the first contention, the Statement above (pp. 3–4) shows ample evidence that petitioner was the very center of the conspiracy to dispose of the counterfeit bills.

As to the second contention, the court carefully cautioned the jury each time the statements of co-conspirators were admitted that they should not be considered as against any defendant not present when the statements were made until his participation was shown by independent evidence (Tr. 139–141, 188, 202–203, 676). This instruction was repeated in the court's charge (Tr. 768). As we have noted, the independent evidence before the jury clearly supported its finding that petitioner was a part of the conspiracy, at least by the time contact was established with him. Contrary to petitioner's suggestion (Pet. 12), there is no rule that the defendant must be shown by independent evidence to be a member of a conspiracy at the time of the declaration when the conspiracy exists at that time, at least where the independent evidence connects

him to it soon thereafter. That petitioner was the party referred to by nickname in the various statements was sufficiently shown by testimony that Ellis addressed him by this name when he and Wood were admitted to the apartment and that petitioner responded to this form of address.

3. This Court has held that defendants are entitled to the production of grand jury testimony only when "'a particularized need' exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Here, petitioner made no such showing (see Tr. 234, 246–247). The witness, a government agent, was extensively cross-examined by four defense attorneys, two of whom questioned him specifically as to his prior statement to the Secret Service, without revealing any discrepancies from his testimony at trial (Tr. 235–236, 248–254, 317–218). Moreover, Wood's testimony was corroborated by the testimony of defendant Bescoe and of the surveilling agents, as well as by records showing telephone calls and his meetings with the conspirators at two hotels (see pp. 3–4 above). Although petitioner took the stand and denied offering to sell counterfeit currency to Wood, he admitted the meeting and that the subject was brought up by Wood, but asserted that he had indignantly denied having any counterfeit currency for sale (Tr. 674–676). Defendant Ellis, who was also present, did not testify. There was thus no ground for believing that Wood's grand jury testimony would present anything substantially different from his prior statement to

official sources. Cf. *De Binder* v. *United States*, 292 F. 2d 737 (C.A. D.C.).

In *Pittsburgh Plate Glass Co.*, this Court did not decide whether the trial judge must look at the testimony of a witness before the grand jury in order to decide whether the minutes should be turned over. 360 U.S. at 401. However, it did hold that this Court's holding in *Jencks* v. *United States*, 353 U.S. 657, concerning the production of statements made to the government by government witnesses "had nothing to do with grand jury proceedings." 360 U.S. at 398. It is thus implicit in the *Pittsburgh Plate Glass Co.* decision that where, as on the facts of this case, no particularized need for the grand jury testimony of a witness is shown, the trial judge is not required to examine the testimony merely to determine whether there might be some inconsistency with the witness' testimony at the trial. *E.g.*, *Jackson* v. *United States*, 297 F. 2d 195 (C.A. D.C.); *Parr* v. *United States*, 265 F. 2d 894 (C.A. 5), reversed on other grounds, 363 U.S. 370; *Hance* v. *United States*, 299 F. 2d 389, 398 (C.A. 8); *Bary* v. *United States*, 292 F. 2d 53 (C.A. 10). While *in camera* examinations of grand jury testimony are made upon request as a matter of course in the Second Circuit (*e.g.*, *United States* v. *Giampa*, 290 F. 2d 83, 85), that variation from the practice in the other circuits has not been deemed by this Court a matter requiring review, where on the facts no "particularized need" for inspection was shown. *Berry* v. *United States*, 295 F. 2d 192 (C.A. 8), certiorari denied, 368 U.S. 955; *Brilliant* v. *United States*, 297 F. 2d 385

(C.A. 8), certiorari denied, 369 U.S. 871. There is similarly no occasion for review in this case.

4. (a) During the cross-examination of agent Wood the defendants attempted to imply that he destroyed notes of his conversations in order to avoid cross-examination as to their contents (Tr. 271–272). Upon redirect examination, Wood explained that the reason for their destruction was that it was unsafe to have notes on his person, as he never knew when he might be shaken down. He was then asked as to what the result might have been if notes had been found on his person (Tr. 414). The court sustained petitioner's objection to the question, but denied the motion for a mistrial (Tr. 415).

Petitioner himself opened up this line of questioning by repeated questions about the agent's failure to retain the notes. As the district court said, "[s]urely defense counsel was aware that such an attack invited explanatory counter questions. He cannot now be heard to complain because the unuttered answers of one such question *might* have included fear of violence" (Pet. App. 28). But even if the question put to the witness was objectionable in that it required the witness to indulge in speculation, the objection was promptly sustained.

(b) The record does not support petitioner's charge (Pet. 11) of misconduct by the Assistant United States Attorney "in displaying the counterfeit $20.00 Federal Reserve Notes to the jury, committing the government to their introduction into evidence, and then failing to do so." It appears that there was a

sidebar discussion at which government counsel stated that some of the notes on the counsel table were those passed by defendant Roberts, but that the witnesses to identify the bills were not readily available (Tr. 492–493). Petitioner's counsel did not press the matter further (Tr. 493–494):

> I just asked the question. Well; as long as the District Attorney doesn't use them and Your Honor instructs them.

The court proceeded to instruct the jury that the money which had been handled at the government counsel table was not in the case, that the jury were to disregard it, and that the only evidence which they should consider was that coming from the witness stand (Tr. 494). The court thus complied with petitioner's request and he made no further objection.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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